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BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF MINORITY BUSINESSES, IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE[1]

The National Association of Minority Businesses (NAMB) respectfully moves the Court for leave to file, in support of the Respondents, the annexed brief *amicus curiae* on the merits of the appeal in this case by the Petitioner, Adarand Constructors, Inc. NAMB obtained the consent of the United States, Solicitor General and of Mr. William Perry Pendley of Mountain States Legal Foundation, counsel for Petitioner.

I

NAMB is an incorporated 501(C)(6), voluntary, association located in Arlington, Virginia. NAMB members are minority owned businesses nationwide. NAMB maintains a membership totalling 150 companies, of which most or all are members of one minority community or another. NAMB is the premiere, national-scale minority association in the United States which provides business assistance and information regarding federal government procurement. It maintains members from all fifty states and the Virgin Islands. Its purpose is to further the objectives of minority communities, and to provide education, information, training and networking opportunities for these groups. Particularly, at the heart of NAMB is its service of gathering information and providing assistance, to its members, regarding the various federal socially and economically disadvantaged business federal contracting programs. Many members engage in government contracting, both on the basis of federal and state socially and

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[1]The parties have consented to the submission of this brief. Their letters of consent have been filed with the Clerk of the Court.

economically disadvantaged business contracting programs.

Every member of NAMB, and thus NAMB itself, will be impacted by the outcome of this case, hence, the membership and the organization maintain an actual and substantial interest in this matter. Despite its interest, NAMB did not participate in the proceedings in the court below solely because it was unaware that such proceedings were in progress until it was too late to intervene therein.

II

The questions presented by the appeal in this case are vitally important to NAMB, its members and affiliates. The appeal questions, particularly, Department of Transportation socially and economically disadvantaged business federal contracting regulations. However, this case impacts generally all federal government socially and economically disadvantaged business contracting programs. The appeal seeks a determination, among other things, that the socially and economically disadvantaged business federal contracting program in question has exceeded its objectives and otherwise cannot be justified when subject to the appropriate standard. Moreover, that standard has been placed in question. In the broadest sense, then, the effect of racism in this country is under review. Particularly, how and to what extent racism has harmed minorities is questioned.

The potential ramifications of this appeal are broad, and their effect wide-ranging. Conceivably, the practical effect may be a re-examination of and fundamental change to all socially and economically disadvantaged business federal contracting programs. Perhaps, these programs will be removed and new ones recreated. Perhaps, they will just be removed or modified. In any event, the possibilities are numerous, although one thing is clear; any outcome other than one in favor of the Respondent is certain to negatively affect NAMB members.

NAMB members have a substantial business interest in participation in and access to the system governed by the Department of Transportation socially and economically

disadvantaged business federal contracting that is questioned by this appeal, and in most other federal contracting programs. The association itself operates to further enhance participation in such programs. The impact of an outcome favoring the Petitioner will be a removal of or decrease in the primary source of income for many NAMB members, causing a significant and substantial decrease in membership. Likewise, without the benefit of the continued existence of these programs in their present form, which is a conceivable ramification of a successful appeal herein, the heart of NAMB will be viscerated; its purpose minimized, and its *raison d'etre* permanently and substantially decreased.

III

Finally, the Respondents in this case are not in the same position as is NAMB to speak for the whole of minority members around the Country with regard to the important problems of statutory construction before the Court on this appeal. Similarly, other entities which have successfully sought to file briefs *amicus curiae* in this appeal are not in the same position as NAMB. NAMB is, perhaps, the only national-level entity capable of representing all forms of minorities; particularly, those interested in engaging in socially and economically disadvantaged business federal contracting programs. Groups such as the American Civil Liberties Union (ACLU), for example, although representing the needs of minorities generally, do not provide direct assistance with regard to federal socially and economically disadvantaged business federal contracting programs such as the one questioned by this appeal.

Wherefore, NAMB respectfully moves the Court for leave to file the brief annexed hereto on the merits of the questions raised by the appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The National Association of Minority Businesses (NAMB), in support of Respondent, hereby asserts its position with regard to the legal issues presented in this appeal. Particularly, NAMB takes issue with the Petitioner's position on several points. First, NAMB challenges Petitioner's argument that the federal regulations under examination impose an automatic presumption of social disadvantage. Second, it is NAMB's position that maintaining diversity in federal government contracting and promoting use of historically under-utilized business concerns furthers both a substantial and a compelling government interest, and otherwise is narrowly tailored to satisfy that interest. Finally, although the interest in maintaining diversity in federal government contracting and the use of historically under-utilized business concerns satisfies both strict and intermediate levels of constitutional scrutiny, intermediate scrutiny is the appropriate standard of review.

I

In pursuit of this appeal, Petitioner claims that there exists a presumption of social disadvantage under the Small Business Administration and Department of Transportation regulations, and that that presumption is automatically and erroneously made, and has caused Petitioner harm. Petitioner's claim is defective in that no such presumption, based on the language of the cited regulations, 13 C.F.R. 124.105(b) and 48 C.F.R. 52.219-8, can be reasonably found. Those sections read together, in pertinent part, mandate the satisfaction of an express condition before a presumption will be made.

Significantly, before a minority contractor may access the program, such minority member must separately qualify for the program, as both socially and economically disadvantaged, after submitting an extensive set of application materials, including financial materials and certifications to the effect that they have in fact been disadvantaged. 13 C.F.R. 124.105(b)(2).

If the condition is not satisfied after review of the application materials, then no presumption is permitted. The

operative language of 13 C.F.R. 124.105(b) reveals this express condition as follows: **"In the absence of evidence to the contrary**, the following individuals are presumed to be socially disadvantaged." (emphasis added). Clearly, the plain meaning of this express language imposes a condition that if and only if there is no evidence showing the applicant has not been disadvantaged in the application materials or elsewhere, can it then be presumed that that applicant has in fact been disadvantaged and gain access to the program. Stated another way, if evidence in the application materials or elsewhere is presented which contradicts a claim of disadvantage, then the minority contractor will not be granted access to the program. No automatic presumption exists as Petitioner claims.

In short, after submitting application materials to evidence a claim that they have been socially and economically disadvantaged, a minority contractor may only then satisfy the requisite condition, and at that point be considered adequately disadvantaged to participate in the program.

II

Moreover, maintaining diversity in federal government contracting furthers both a substantial and compelling government interest, and as such satisfies the requisite legal standard. In fact, the promotion of racial diversity in the area of broadcasting has already been established as furthering an important governmental interest. *See Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Logic and reason dictate that the Court follow *Metro* and apply that rationale to the area of government contracting.

Likewise, the race-based contracting programs are narrowly tailored to surpass both the intermediate and strict scrutiny tests. They additionally cannot be more narrowly tailored than at present without adversely affecting the highly important governmental interests that they have been designed to further, and in fact do further.

ARGUMENT

I. THE PETITIONER'S CLAIM THAT THERE IS A PRESUMPTION OF SOCIAL DISADVANTAGE IS MISLEADING

A. The Personal Eligibility Statement Required Of 8(a) Applicants Demonstrates That No Presumption Of Social Disadvantage Exists

Petitioners claim that "a member of a listed minority group obtains DBE [disadvantaged business enterprise] status merely by proving that individual's membership in one or more of the "presume[d]" disadvantaged minorities."[2] In support of this contention, Petitioners rely on 13 C.F.R. §124.105(b) which states:

> "In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians)..."

Petitioners further rely on 48 C.F.R. §52.219-8, which states in relevant part:

> "The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act."

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[2]Petitioner's brief at p. 23.

Petitioner's contention that this presumption allows members of the enumerated minority groups to obtain DBE status merely by virtue of showing membership in such groups is not correct. In order to obtain DBE status, one must do much more than simply claim membership in an enumerated minority group, and there is no presumption of DBE status based merely upon membership in one of the enumerated minority groups.

Petitioner misconstrues the process required to obtain DBE status. The regulations relied upon by the Petitioner do not fully illuminate the "social disadvantage" issue. A prospective applicant must certify under penalty of law that he or she is socially disadvantaged. It is the meaning of the certification that is important.

To certify that one is socially disadvantaged, one is alleging under penalty of law that they have been subjected to racial or ethnic prejudice or cultural bias because of their identification [by others] as members of groups without respect to their individual qualities.[3] Simply to be a member of a particular racial or ethnic group does not make one eligible for "social disadvantage" status. The "presumption" discussed in 13 C.F.R. 124.105(b) and relied upon by Petitioner is one of post-certification eligibility for socially disadvantaged status, not final DBE eligibility or status as socially disadvantaged.

To allege that one is socially disadvantaged is to swear and aver to the fact that one has personally experienced racial or ethnic prejudice and/or cultural bias. The regulation relied upon by Petitioner merely illustrates the respect given to an applicant's certification that he or she is socially disadvantaged. It is not a determination of DBE status or "social disadvantage" status.

Petitioner's reliance on 48 C.F.R. 52.219-8 is misplaced in that this regulation does not discuss eligibility for social disadvantage status. Rather, it speaks to the respect that must be

[3]13 C.F.R. 124.105(a).

given by private contractors to the federal certification and eligibility process. In stating that the contractor shall presume that certain groups of individuals are socially disadvantaged, including those certified by the administration and the Small Business Administration's 8(a) program, the regulation merely denies the private contractor the ability to unilaterally bar socially and economically disadvantaged individuals from participation in the programs established for their benefit. Additionally, it directs private contractors to respect the policing process already established under the regulations promulgated by the Department of Transportation and the Small Business Administration.[4] The subject regulation makes clear that private contractors have no authority to upset the procedural process set forth in the regulations and that they must respect the certification process.

13 C.F.R. 124.105(b) begins with the phrase "In the absence of evidence to the contrary..." Such language is at odds with the notion that a presumption of DBE status exists by virtue of membership in an enumerated minority group without more and Petitioner's assertions as such are false. The language of this statute clearly requires more than mere membership in the minority group. The statute does not read "The following individuals are presumed to be socially disadvantaged..." Because the statute requires more, it cannot be said that a presumption of DBE status exists by virtue of membership in one of the enumerated minority groups. The statute requires respect for an individual's certification of social disadvantage. The statutory language cited by the Petitioner is taken out of context and cannot be read without including other sections which effectively set forth the DBE certification process. The certification process not only includes a finding of social disadvantage, but, additionally, economic disadvantage must naturally flow therefrom. Moreover, other elements such as business size, revenue, and duration of time in

[4]49 C.F.R. 23.69 and 13 C.F.R. 124.101, et. seq.

business are determining factors.[5]

In order to obtain eligibility under § 8(a) of the Small Business Act, an individual or concern applicant must complete an 8(a) Personal Eligibility Statement. The first part of this application requests information related to social disadvantage. Question 2 in this section asks an applicant why they are claiming social disadvantage. This question allows an applicant to state that they are claiming social disadvantage because of their identification [by others] as a member of one of the minority groups enumerated in 13 C.F.R. 124.105(b). This does not depend simply upon membership in a minority group, but hinges on the fact that others have identified the applicant as a member of a minority group and have discriminated against the applicant because of this fact. 13 C.F.R. 124.105(a) states:

> "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control."

When an applicant claims social disadvantage under question two of the Personal Eligibility Statement, they are certifying that they have experienced racial or cultural bias as an individual. Being a member of a racial minority group alone will not suffice to obtain eligibility. A person who has not experienced specific instances of racial, ethnic or cultural discrimination or bias would not qualify as socially disadvantaged regardless of their race or ethnicity.

The Personal Eligibility Statement asks applicants to further enumerate the types of prejudice they have suffered and to certify that such prejudice has impaired the applicant's ability to

[5]See generally 13 C.F.R. §§124.101 - 124.109.

compete in the free enterprise system due to the applicant's diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. This detailed inquiry and certification process determines an individual's ability to participate in the program, and to be certified socially and economically disadvantaged. It is not enough that an individual merely be a member of a minority group. One must certify that they have experienced personal discrimination and bias and that as a result of that discrimination and bias, they have been denied access to credit and capital. This is hardly a presumption.

If an applicant responds affirmatively that he or she has been denied access to credit and capital because of discriminatory practices, the applicant is required to document such impairment with specific examples. Moreover, each applicant must sign and certify, under penalty of ten years imprisonment or fine of up to $500,000, that all information in the application is true and complete.[6] Socially disadvantaged status, in other words, must be certified and proved. This extensive, in depth, application process evidences that there is no presumption of DBE status merely because an individual is a member of an enumerated minority group.

B. The Federal Small Business Administration Regulations Require Proof Of Eligibility

The extensive 8(a) application procedure is consistent with the eligibility requirements for participation in the federal

[6]The signature page on the 8(a) Personal Eligibility Statement at paragraph (f) reads as follows: "False Statements: If you make a statement herein which you know to be false, under provisions of the Small Business Act you can be subject to a fine of not more than $500,000 or by imprisonment for not more than 10 years, or both."

contracting programs.[7] Under 13 C.F.R. 124.102, an applicant must first qualify as a small business concern. 13 C.F.R. 124.103 sets forth the requirement that an applicant concern must be at least 51% owned by socially and economically disadvantaged individuals. Management and daily operations must be controlled by applicants determined to be socially and economically disadvantaged under 13 C.F.R. 124.104. 13 C.F.R. 124.105-106 set forth the requirements that an applicant be socially and economically disadvantaged. An applicant must have been in business for two full years in order to be eligible under 13 C.F.R. 124.107, and applicants must adhere to certain standards of conduct to gain eligibility under 13 C.F.R. 124.108. Finally, certain types of businesses are *per se* excluded as ineligible under 13 C.F.R. 124.109.

An individual or concern may show social disadvantage by certifying that others have identified that individual as a member of one of the enumerated minority groups and have discriminated against him accordingly. An individual must certify that he or she has been subjected to racial or ethnic prejudice or cultural bias, as well as certifying that the disadvantage stems from circumstances beyond his or her control.[8] If an applicant elects to show socially disadvantaged status through identification by others and corresponding discrimination as a member of one of these groups, that individual may have further requirements placed upon him. 13 C.F.R. 124.105(b)(2) states:

> "An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if Small Business Administration has reason to question such individual's status as a group member."

This language indicates that merely because an applicant says he or she is a member of a minority group so enumerated does not create a presumption that the applicant is socially disadvantaged. An applicant may be required to prove these allegations. If one is required to prove their status, there can be no presumption of status. Furthermore, if one is required to certify under penalty of up to ten years imprisonment and/or up to $500,000 in fines, that certification of disadvantaged status is accurate, there can be no presumption of socially disadvantaged status. A presumption means there is nothing further to prove.

To qualify as a DBE, an applicant must show more than mere social disadvantage. Economic disadvantage is also required. 13 C.F.R. 124.106 sets forth the criteria for economic disadvantage.

> "For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, Small Business Administration shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically

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[7] See 13 C.F.R. 124.101 - 124.109 setting forth all of the eligibility criteria that each applicant must meet.

[8] 13 C.F.R. 124.105 (a) states: "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The racial disadvantage must stem from circumstances beyond their control."

disadvantaged individuals."

Simply because an applicant is determined to be socially disadvantaged does not mean the applicant is also economically disadvantaged. And, if no economic disadvantage can be demonstrated, then the individual will not obtain DBE status. From the language quoted above, it is clear that more than social disadvantage is required to obtain DBE status.

In addition to social disadvantage, an applicant's ability to compete in the free enterprise system must be impaired by diminished capital and credit opportunities as a result of their social disadvantage. The program therefore excludes those members of enumerated minority groups who are socially disadvantaged but who have accumulated substantial wealth.[9] Other factors are also considered in determining economic disadvantage.[10]

In sum, there is no presumption of social disadvantage where an applicant is required to certify and/or prove such disadvantage. To certify that one is socially disadvantaged is to swear and aver to the fact that one has experienced racial, ethnic, and/or cultural bias and discrimination. The eligibility requirements of the 8(a) program and the application itself clearly demonstrate that applicants cannot rely on their membership in an enumerated minority group alone to obtain eligibility, or even to merely obtain socially disadvantaged status, neither of which alone results in DBE certification.

C. Both Small Business Administration And Department of Transportation Regulations Demonstrate That Specific Proof Of Social Disadvantage Is Required

[9]13 C.F.R. 124.106(a)(i)(ii).

[10]13 C.F.R. 124.106(a)(2).

The Petitioner argues that only the specified racial and ethnic classes of persons can be socially disadvantaged. Petitioner argues further that only the specified racial minorities are subject to a presumption of disadvantaged status. These arguments are misleading. First, there is no presumption of socially disadvantaged status. Social disadvantage must be proven, and must be proven on an individual case by case basis. Furthermore, Petitioner's assertion flies in the face of the plain language of the regulations they attempt to construe with respect to the subject procurement eligibility. DBE status in the subject procurement program is governed by either one of two groups of federal regulations. The first group of regulations that determines eligibility for DBE status is the Small Business Act's 8(a) program eligibility requirements.[11] The second set of federal regulations are the regulations promulgated by the Secretary of the Department of Transportation.[12] An individual or concern applicant may obtain socially disadvantaged status under either set of federal regulations for purposes of participation in the subject procurement.

As explained previously, under the 8(a) eligibility requirements, social disadvantage is not limited to members of the enumerated racial or ethnic groups. Eligibility for the program is not foreclosed to anyone, provided they meet the enumerated criteria.[13] Not only is the program open to members of all racial or ethnic groups, but moreover, there is an appeal procedure for added review should an applicant be denied eligibility to participate

[11]13 C.F.R. 124.101-109.

[12]49 C.F.R. 23.51-69.

[13]13 C.F.R. 124.105(a) states the general eligibility as follows: "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identification as members of groups without regard to their individual qualities."

in the program.[14] Nothing in the regulations stops Petitioner from applying for 8(a) program eligibility and proving their status for participation, even if Petitioner is not a member of one of the enumerated minority groups.

Petitioner mischaracterizes, misstates and misleads the Court with respect to their assertion that the "enumerated" racial minorities alone are eligible for socially disadvantaged status for the purposes of the subject procurement program. The regulations promulgated by the Office of the Secretary of Transportation make it clear that anyone who can demonstrate that they have personally suffered social disadvantage, stemming from his color, national origin, gender, physical handicap or other cause beyond that individual's control, may be eligible.[15] Although racial minorities have been certified, the process is not closed to anyone who can meet the eligibility criteria.

No presumption of socially disadvantaged status can exist where a business must certify its eligibility. According to Department of Transportation regulations 49 C.F.R. 23.51, a Department of Transportation recipient [state authority] must certify as eligible, individuals or concerns who wish to participate in the Department of Transportation programs. 49 C.F.R. 23.53 goes on to set forth the eligibility requirements a recipient must use to determine whether a business is eligible to be certified as an DBE. The regulations do not require the recipient to accept an applicant's claim of eligibility to be certified as an DBE.[16] Recipients are not limited to certifying the enumerated minority

[14]13 C.F.R. 124.101(a) states in relevant part: "If the application is declined on reconsideration based solely on a negative finding of social disadvantage, economic disadvantage, ownership or control, such decline may be appealed by an unsuccessful applicant to the Office of Hearings and Appeals."

[15]49 C.F.R. Part 23, Subpart D, Appendix C, (A)(1)(i) and (ii).

[16]49 C.F.R. 23.53(a)(1).

groups as socially and economically disadvantaged for purposes of program participation, but may determine that individuals not in an enumerated group are also socially and economically disadvantaged. For Department of Transportation program purposes, there is no presumption of eligibility. Rather, the presumption created is that the DBE status certified by the applicant under 49 C.F.R. 23.51 is accurate. Even that presumption may be rebutted by the recipient [state]. 49 C.F.R. §23.53(a)(1) merely allocates the burden of proof to the recipient [state] after an applicant has certified to socially disadvantaged status. The challenge procedures clearly state that individual instances of bias and discrimination must be shown in order to obtain DBE status, and more particularly, socially disadvantaged status. An "individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged."[17] This can be achieved by setting forth with particularity the instances of discrimination to which the applicant has been subjected. These procedures establish that there is no presumption of eligibility and that such status must be certified, and that certification may be challenged. The Department of Transportation DBE certification process differs from that of the Small Business Administration's 8(a) program in that once certification by the prospective participant [DBE] to the recipient occurs, under Department of Transportation regulation, it is not final. It may be challenged and overturned by the recipient of the subject highway funds, and must be proved again to the recipient in accordance with the challenge procedures set forth in 49 C.F.R. 23.69. 49 C.F.R. Part 23, Subpart D, Appendix C states, in relevant part:

"In making determinations of social and economic

[17]49 C.F.R. Part 23, Subpart D, Appendix C, (A)(1)(ii).

disadvantage, recipients should be guided by the following standards, which have been adopted from materials prepared by the [Small Business Administration]...The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be...The individual's - social disadvantage must be rooted in treatment which he or she has experienced in American society...The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant...Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, longstanding, and substantial social disadvantage...The recipient should consider, as evidence of an individual's social disadvantage, unequal access to credit or capital..."

These regulations are clear in that there is no presumption of eligibility for socially disadvantaged status simply because an applicant is an "enumerated" racial minority.

A recipient [state] may not challenge 8(a) certification; that program is regulated solely by the Small Business Administration. The Federal Department of Transportation regulations direct the state to recognize a DBE's certification of social disadvantage under 49 C.F.R. 23.62. Once the prospective DBE certifies that the applicant is socially disadvantaged under the Department of Transportation regulations, that certification, not merely the

membership of an applicant in one of the enumerated minority groups, is the act which creates a rebuttable presumption that the certification is proper. This rebuttable presumption is discussed at 49 C.F.R. 23.53 and 23.62. A presumption of social disadvantage is distinguishable from a rebuttable presumption that a DBE's Department of Transportation certification of social disadvantage is proper. The respect given to Department of Transportation certification is what creates the presumption. Moreover, unlike the Small Business Administration certification, Department of Transportation allows policing of its program certification by the state. Small Business Administration has its own internal appeals and enforcement procedures.

There is no presumption of social disadvantage simply by an individual's membership in a racial or ethnic minority group. Socially disadvantaged status must be proved and certified individually on a case by case basis by those individuals who seek this status. Insufficient evidence of this status will result in an individual not being deemed socially disadvantaged under either group of federal regulations. The only presumption created in either of these groups of federal regulations is one of accuracy once an individual seeking socially disadvantaged status under either group of regulations so certifies. Meaning, once an individual certifies socially disadvantaged status to Department of Transportation and that certification is acknowledged with respect to program eligibility, the presumption arises that the information relied upon in acknowledging such certification is accurate. The recipient is able to use this presumption in determining whether it, too, will grant certification. There can be no presumption of social disadvantage when an individual must certify and prove those facts which would create eligibility. A presumption does not require proof.

II. THE SUBJECT FEDERAL CONTRACTING PROGRAMS ARE CONSTITUTIONAL AND PASS BOTH INTERMEDIATE AND STRICT SCRUTINY ANALYSIS

A. Diversity In Federal Contracting And Business Utilization Is Both A Substantial And Compelling Governmental Interest

In *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), this Court determined that a state agency seeking to impose a race-based layoff provision must justify that action by showing such action is necessary to a compelling state interest. More specifically, the Court stated that to satisfy this heightened level of scrutiny, the proponent of the race-based provision must meet a two-pronged test. First, it must be shown that the provision is justified by a compelling governmental interest.[18] The second prong of the test requires that the challenged provisions have been narrowly tailored to achieve the compelling government interest.[19]

The Federal Construction Procurement Program was created for the purpose of including historically under-utilized businesses in government contracts.[20] Such a governmental

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[18]*Wygant v. Jackson Board of Education*, 476 U.S. 267, 274, citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

[19]*Fullilove v. Klutznick*, 448 U.S. 448, 480, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

[20]15 U.S.C. 631 (e)(2) states: "It is, therefore, the purpose of section 8(a) [15 U.S.C. §637(a)] to -

> (A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;
> (B) promote the competitive viability of such concerns in the

concern is compelling. It is at least as compelling as the purpose of promoting racial diversity. In *University of California Regents v. Bakke*, 438 U.S. 265, 311-315, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), this Court found racial diversity in higher education to be a compelling government interest. Simply because this Court has not articulated that the inclusion of historically under-represented businesses in government contracting is a compelling government interest does not foreclose that possibility.[21] Moreover, Petitioner, in its brief, has conceded that this Court in the past has found a compelling governmental interest exists where the purpose of a challenged act is to remedy past discrimination. At the very least, the articulated purposes of the Federal Construction Procurement Program are intended to do just that.

In establishing a compelling governmental interest it is unnecessary to identify the specific instances of discrimination to be remedied. In Justice O'Connor's concurring opinion in *Wygant*, at 286, she states that "this remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing remedial action is required."

Congress made specific findings concerning the use of socially and economically disadvantaged businesses and the need to increase the utilization of such concerns in federal construction projects.[22]. The findings by Congress demonstrate the need to encourage diversity among competitors for government contracts,

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> marketplace by providing such available contract, financial, technical, and management assistance as may be necessary; and
> (C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

[21]*Wygant, supra*, at 286 (O'Connor, J., concurring).

[22]15 U.S.C. §631(e)(1).

as well as diversity among competing concerns in the national economy. These findings demonstrate the basis for the firm belief of Congress that remedial action was required. Every participant in the program, whether certified by the Department of Transportation or Small Business Administration has certified and proven they have individually experienced acts of discrimination and/or bias, and that these acts have affected their ability to act in the business world. This is more than mere past discrimination, it is evidence of present and ongoing discrimination and bias.

In order to withstand constitutional scrutiny under an intermediate standard, it must be shown that the challenged act is important to a substantial governmental interest.[23] In light of the atmosphere of ongoing discrimination and bias, the interest of diversity in federal contracting is more than important, it is compelling. This Court addressed the issue of local action adopting minority set-aside programs in *City of Richmond v. Croson*, 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). There this Court held that the appropriate level of scrutiny to be applied was strict scrutiny, requiring the local action to be necessary to a compelling governmental interest. However, in *Fullilove*, the Court declined to apply the strict scrutiny standard to a federal public works act. Finally, in *Metro Broadcasting*, the Court confirmed its holdings in the prior decisions and opined that *Croson* is not the appropriate standard of review for Congressional acts. Today, *Metro Broadcasting* controls the level of scrutiny to be applied to the federal program being challenged.

The Petitioner seems to infer that if Congress deals with a suspect class that Congress cannot have a level of review lower than strict scrutiny. It is well settled that Congress has a lower standard of review for its dealings with suspect classes than do the States. In *Nyquist v. Mauclet*, 432 U.S. 1, 53 L.Ed.2d 63 (1977),

[23]*Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed. 2d 445 (1990), *Fullilove v. Klutznick*, 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980).

this Court ruled that in dealing with alienage, a suspect class, the program initiated by the state of New York was to be reviewed using strict scrutiny. The Court went further to say that the standard of review used to judge congressionally promulgated laws dealing with alienage was a different standard of review. The *Nyquist* Court noted that in *Matthews v. Diaz*, 426 U.S. 67, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976), decided the previous year, the Court applied a relaxed scrutiny and upheld a federal statute which based eligibility for federal medical insurance of aliens upon a durational residency requirement. The Court stated in relevant part, "...Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States."[24] It is not an aberration that acts of Congress are treated differently than acts of the States. Thus, the difference between *Fullilove v. Klutznick*, *Metro Broadcasting v. F.C.C.*, and *City of Richmond v. Croson* are well rooted in precedent established by this Court. In the case at bar, Congress enjoys broad powers over spending and commerce, and should be afforded the same relaxed scrutiny as in *Matthews v. Diaz*.

In *Metro Broadcasting*, this Court found that racial diversity is an important governmental objective. Like the minority businesses in *Metro Broadcasting*, the minority business in the instant case is in competition with non-minority businesses which have historically dominated the industry. The articulated purposes of the Federal Construction Procurement Program of encouraging full participation by minorities in our free enterprise system to reach a level of economic equality and encouraging the development of small business concerns are consistent with the government interest of racial diversity articulated in *Metro Broadcasting*. Racial diversity in broadcasting and higher

[24]*Matthews v. Diaz*, 426 U.S. 67, 84-87.

education are no less important than racial diversity in industry.[25] If this type of governmental interest is important enough to withstand constitutional muster in the broadcast arena, it is surely sufficient in this instance as well. Racial diversity is no less important here. That Congress specifically articulated its purpose in enacting the Federal Construction Procurement Program as goals of full participation and economic equality is synonymous with the purposes of racial diversity. Diversity in federal contracting is both a substantial and a compelling governmental interest and survives both strict and intermediate level constitutional scrutiny.

B. The Subject Federal Contracting Programs Are Narrowly Tailored And Pass Both Intermediate And Strict Constitutional Scrutiny

The second prong of an intermediate level scrutiny analysis requires the government action to be substantially related to the achievement of its important governmental interest. In deciding this factual question, the Court has recognized that agency and Congressional fact-finding warrant great weight.[26] The Congressional findings in this regard, through the certification

[25]The Court in *Metro Broadcasting*, while recognizing racial diversity in broadcasting as an important governmental objective, also relied upon its prior opinion in *University of California Regents v. Bakke*, 438 U.S. 265, at 311-313 that racial diversity in higher education is such a governmental interest upon which race-based admissions criteria may be based.

[26]In *Metro Broadcasting* the Court analyzed the deference that should be given to Congress and the FCC in determining whether minority ownership policies were substantially related to the important governmental interest of broadcast diversity. With respect to such questions, the Court required itself to give "great weight to the decisions of Congress and the experience of the Commission", citing *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, at 102, 93 S.Ct. 2080, at 2086 (1973).

process, make these issues crystal clear.[27] In both the Small Business Administration and Department of Transportation regulations, an applicant must certify and prove that they have been discriminated against; denied business opportunities; and, have received unequal access to credit and capital. The Department of Transportation regulations in pertinent part explain that evidence of social disadvantage includes evidence of unequal access to credit or capital; acquisition of credit under unfavorable circumstances; discrimination in receipt, award, and/or bid of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.[28] All of these elements of social disadvantage are important to a substantial government interest, as well as necessary to a compelling government interest, and are related to the enumerated Congressional purpose of achieving full participation, economic equality, as well as racial diversity in federal contracting.

In order for a challenged act to be narrowly tailored under the strict scrutiny standard, the inquiry is whether a less restrictive means could have been used to effectuate the purposes of the challenged act.[29] In tailoring an action so as to effectuate it in the least restrictive way, this Court has recognized that it may sometimes be necessary to have innocent persons bear some of the burden.[30] However, in fashioning a remedial program that affects innocent persons, the means chosen should not be such that they impose a "disproportionate harm on the interests, or unnecessarily trammel the rights of innocent individuals directly and adversely

[27]15 U.S.C. §631 (e)(1) sets forth the findings of Congress with respect to the purposes of the development of the 8(a) program.

[28]49 C.F.R. 23.69, Appendix C, (A)(2)(iii).

[29]*Wygant*, at 280 (footnote 6).

[30]Id. at 280-281.

affected by a plan's racial preference."[31] It is permissible to burden innocent parties in a manner which does not unnecessarily trammel the interests and rights of such parties, the effect of which is to merely foreclose one of many options of these parties.

The Federal Construction Procurement Program, while it does affect innocent parties, does not do so in an impermissible manner. The program gives opportunities to socially and economically disadvantaged, as well as historically under-utilized, businesses. It does not directly take away anything, unduly burden, or traverse upon the rights of innocent parties. In this way the Federal Construction Procurement Program can be analogized to remedial hiring goals. This Court in *Wygant*, at pp. 282-283, has stated, "denial of a future employment opportunity is not as intrusive as loss of an existing job." In the case at bar, Petitioner has not shown that it had any firm expectation of receiving the subcontract. Petitioner was one of many who submitted a bid for the project, uncertain of whether it would be hired. Petitioner's expectation of being hired was no greater than that of any other bidder. Moreover, Petitioner was not deprived of anything. The Federal Construction Procurement Program is narrowly tailored to the compelling governmental interest of promoting utilization of historically under-utilized business concerns and encouraging diversity in the competitive market for government contracts. As the decision to award the subcontract to Respondent was a hiring decision, it may be considered a less intrusive means of achieving the governmental interest at stake. The burden of the Federal Construction Procurement Program is sufficiently distributed among a large population, all subcontract bidders, so as to make its methods less intrusive.

The Federal Construction Procurement Program is narrowly tailored in another respect. The program is open to all socially and economically disadvantaged business concerns that are able to meet

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[31]Id. at 287 (O'Connor, J., concurring).

the program's strict eligibility criteria. 13 C.F.R. Ch. 1 §124.101 (a) states that in order to obtain eligibility to participate in the program, applicants must meet all the eligibility criteria[32]. 13 C.F.R. Ch. 1 §124.101 (b) goes on to state that to maintain eligibility, the same criteria must continue to be met. In short, to be eligible for the Federal Construction Procurement Program, an applicant must qualify as a small business concern, the applicant concern must be at least 51% owned by a U.S. citizen(s) who qualifies as socially and economically disadvantaged, the concern must be managed and controlled by socially and economically disadvantaged individuals, the concern must have been in business in its industry classification for a minimum number of years (2), the concern may be subject to individual character review, and certain types of businesses are per se excluded from the program. 13 C.F.R. Ch. 1 §§124.102-124.109.

Eligibility in the Federal Construction Procurement Program requires much more than simply qualifying as a socially and economically disadvantaged business concern. The socially and economically disadvantaged criteria is further divided. Once a concern acquires socially disadvantaged status, that status merely qualifies the concern under one of many eligibility requirements. A showing of social disadvantage does not alleviate the need to show economic disadvantage, among other requirements. The Federal Construction Procurement Program requirements for eligibility are extensive and clearly show that Congress, in enacting the program, narrowly tailored it to comport with the specific purposes of the act and compelling governmental interests. The Federal Construction Procurement Program is not broad or overreaching, but is narrowly tailored since those concerns which become certified under Federal Construction Procurement must show with particularity their social and economic disadvantage and must swear under oath to that fact.

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[32]see also Office of the Secretary of Transportation regulations at 49 C.F.R. Part 23, Subpart D, Appendix C.

Moreover, the Federal Construction Procurement Program is limited in extent and duration. 13 C.F.R. Ch. 1 §124.101(b) sets forth the requirements for continuing eligibility. Those provisions require concerns to continue meeting the initial eligibility requirements, and further set forth procedures by which to terminate a concern's eligibility to participate in the program. This ensures that once certified, a concern may not take advantage of its participation in the program indefinitely. The act goes so far as to encourage private policing of its provisions by the general public to ensure that individuals or concerns which are not eligible will be so identified. 13 C.F.R. Ch. 1 §124.101(c).

In sum, the Federal Construction Procurement Program is sufficient to withstand constitutional muster under the strict scrutiny standard. The program serves a compelling governmental interest and is narrowly tailored to achieve those interests.

CONCLUSION

The federal contracting program in question is narrowly tailored to achieve a compelling government interest. There is no presumption of social disadvantage. It is not overinclusive, overbroad, or overreaching. It does not go on in perpetuity and its duration is sufficiently limited. The proper standard of review of this program is intermediate or relaxed scrutiny. It need only be demonstrated that the program in question is substantially related to an important government interest. Nevertheless, the subject program also passes a strict scrutiny analysis as well, since it is necessary to a compelling state interest and narrowly tailored to achieve that interest.